Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00074-CV

Stacey **SCOTT**,
Appellant

v.

Larry **FURROW** and Keller Williams Legacy Group,
Appellees

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 13-1125-CV
Honorable W.C. Kirkendall, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Jason Pulliam, Justice

Delivered and Filed: March 9, 2016

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

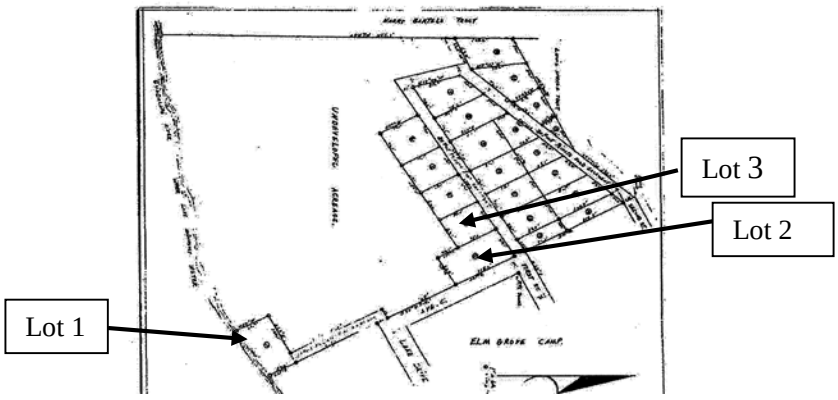
Stacey Scott sued Larry Furrow, Keller Williams Legacy Group and others. As against Furrow and Keller Williams, Scott alleged various claims seeking to recover damages resulting from alleged misrepresentations regarding the waterfront character of certain real property. The trial court granted a traditional summary judgment in favor of Furrow and Keller Williams on all of Scott's claims and severed the claims against Furrow and Keller Williams into a separate cause. The trial court subsequently entered a final judgment incorporating the prior order and granting a traditional summary judgment in favor of Furrow and Keller Williams on their counterclaims for

attorney's fees. Scott appeals, asserting the trial court erred in granting the summary judgments. We affirm the portion of the trial court's judgment ordering that Scott take nothing on her claims against Furrow and Keller Williams. We reverse the portion of the trial court's judgment awarding Furrow and Keller Williams attorney's fees, and we remand the cause for further proceedings.

BACKGROUND

In 2006, Scott purchased a house at 1104 Peggy Lane in Seguin, Texas. The house was located on a lot of property in the A J Grebey Subdivision No. 1 ("Lot 2"). The property was described in the MLS listing as waterfront/water access property. Keller Williams was the listing office, and Furrow was the listing agent.

Lot 2 was not located along any waterfront; however, during Scott's inspection of Lot 2, Furrow also showed Scott another lot ("Lot 1"), which was a fenced lot along the waterfront. In 2007, Scott purchased another vacant lot of property ("Lot 3") which adjoined Lot 2. The following is a depiction of the lots:



In 2013, Scott sued Furrow and Keller Williams. In her amended petition, Scott alleged Furrow "represented to [her] that 'Lot 1' was the exclusive waterfront/water access property, to Lots 2 and 3." Based on Furrow's alleged representations, Scott asserted she believed "by purchasing 'Lot 3', she was solidifying exclusive ownership rights to the waterfront/water access

property ("Lot 1")." Scott asserted DTPA, fraud, negligent misrepresentation, and conspiracy claims.

Furrow and Keller Williams filed a motion for traditional and no-evidence summary judgments. In their motion, Furrow and Keller Williams asserted the following grounds for traditional summary judgment: (1) all of Scott's claims were barred by the statute of limitations based on information available in the real property records when Scott purchased the lots; (2) Scott's DTPA, negligent misrepresentation, and conspiracy claims were barred by limitations based on an email Scott sent on March 23, 2011 raising questions regarding her legal rights to Lot 1; and (3) Scott's DTPA, fraud, and negligent misrepresentation claims were contradicted by Scott's deposition testimony. Furrow and Keller Williams also asserted various grounds for a no-evidence summary judgment. The trial court granted the traditional motion for summary judgment, denied the no-evidence motion for summary judgment, and severed the claims against Furrow and Keller Williams into a separate cause.

After the severance, Furrow and Keller Williams filed a motion for summary judgment on their counterclaims for attorney's fees. In their motion, Furrow and Keller Williams asserted the right to recover attorneys' fees based on two grounds: (1) a contractual right to attorneys' fees under the earnest money contract Scott signed relating to her purchase of Lot 2; and (2) attorneys' fees as sanctions under section 17.50(c) of the DTPA for filing a groundless-bad faith DTPA claim. The trial court granted the summary judgment and awarded Furrow and Keller Williams $70,179 in attorney's fees through judgment plus conditional appellate attorney's fees. Scott appeals.

STANDARD OF REVIEW

We review a trial court's granting of a summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A defendant seeking summary judgment based on an affirmative defense such as limitations must conclusively prove each element of the defense.

Shah v. Moss, 67 S.W.3d 836, 842 (Tex. 2001). "Thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury." *KPMG Peat Marwick v. Harrison Cty. Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). When reviewing a summary judgment, we take as true all evidence favorable to the non-movant, indulging every reasonable inference and resolving any doubts in the non-movant's favor. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004).

LIMITATIONS

In her first issue, Scott contends the trial court erred in granting summary judgment on the basis of limitations because the public records did not "foreclose application of the discovery rule" with regard to her claims. The evidence is undisputed that at the time Scott closed on her purchase of Lot 2, a plat was on file in the deed records in which Lot 1 is "dedicated to the use and benefit of the lot owners in said subdivision [A J Grebey Subdivision No. 1] as a park and for the purpose of granting the said lot owners access to upper Lake McQueeney." Scott's deed to Lot 2 references this plat.

The parties agree that the discovery rule tolled limitations on Scott's claims until she discovered or in the exercise of reasonable diligence should have discovered the alleged falsity of Furrow's alleged representations regarding the ownership of Lot 1. *See Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 617 (Tex. 2007) (noting fraud claim must be brought within four years of when the fraud should have been discovered by reasonable diligence); *Matthiessen v. Schaefer*, 27 S.W.3d 25, 31 (Tex. App.—San Antonio 2000, pet. denied) (applying discovery rule to negligent misrepresentation claim); *In re Estate of Herring*, 970 S.W.2d 583, 586 (Tex. App.—

Corpus Christi 1998, no pet.) (applying discovery rule to conspiracy claim); TEX. BUS. & COM. CODE ANN. § 17.565 (West 2011) (providing DTPA claims must be brought within two years after the consumer discovers or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading or deceptive act or practice). The parties disagree as to whether the plat in the deed records constituted notice to Scott so that her claims accrued on the date of her purchase.

1. *Ojeda de Toca v. Wise*

In support of her position, Scott primarily relies on the Texas Supreme Court's decision in *Ojeda de Toca v. Wise*, 748 S.W.2d 449 (Tex. 1988). In that case, the Texas Supreme Court held imputed notice under the real property recording statutes does not operate as a defense to a buyer's action for damages arising out of deceptive trade practices. *Id*. at 449-50. Relying on the purpose of the recording statutes, the court reasoned:

> The quoted text [from American Jurisprudence regarding the purpose of recording statutes] emphasizes the evil which legislatures across the country have attempted to remedy through real property recording statutes: a good faith purchaser should not lose title to real estate when he has exercised diligence to verify the seller's ownership. Responding to these concerns, the Texas Legislature enacted a comprehensive statutory recording system which provides in part that "[a]n instrument ... properly recorded in the proper county is notice to all persons of the existence of the instrument." TEX. PROP. CODE ANN. § 13.002 (Vernon 1984). Despite this and substantially identical predecessor provisions, Texas courts have never held that a purchaser's failure to search the deed records would bar his fraud action against the seller. *See Graham v. Roder*, 5 Tex. 141, 147 (1849) (fraud and deceit action maintainable despite fact that plaintiff "did not go to the records, the proper source for information"); *Buchanan v. Burnett*, 102 Tex. 492, 119 S.W. 1141 (1909). *See also Boucher v. Wallis*, 236 S.W.2d 519, 526 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.) ("purpose of recording laws is to notify subsequent purchasers ... and not to give protection to perpetrators of fraud"); Restatement (Second) of Torts § 540 comment b (1977).

Id. at 451.

In reaching its decision in *Wise*, however, the court reasoned the appellant's reliance on *NRC, Inc. v. Pickhardt*, 667 S.W.2d 292 (Tex. App.—Texarkana 1984, writ ref'd n.r.e.), was

misplaced because "*Pickhardt* involved a statute of limitations defense." Based on its distinction of *Pickhardt*, we conclude the holding in *Wise* prevents a defendant from using imputed notice from the deed records as a direct defense against a DPTA claim but not from relying on the deed records to establish when a plaintiff should have discovered a claim for limitations purposes. *See Am. Homeowner Pres. Fund, LP v. Pirkle*, No. 02-14-00293-CV, 2015 WL 5173066, at *9 n.11 (Tex. App.—Fort Worth Sept. 3, 2015, pet. filed) (citing *Wise* to note that failure to search deed records would not preclude fraud claim by purchaser but further noting limitations on such a claim would begin to run immediately because the purchaser was on notice of the deed records for purposes of limitations).

Limiting the holding in *Wise* in this manner is supported by the Texas Supreme Court's more recent holding in *Ford v. Exxon Mobil Chem. Co*, in which a plaintiff sued for real estate fraud alleging "he signed [an amendment to an easement] only because [the defendant] falsely represented that the original easement covered [ ] three tracts, when in fact it covered only one." 235 S.W.3d 615, 616-17 (Tex. 2007). The court rejected the plaintiff's contention that the court of appeals erred in holding his fraud claim was barred by limitations, asserting "While not all public records establish an irrebuttable presumption of notice, the recorded instruments in a grantee's chain of title generally do." *Id*. at 617. Thus, in addressing a statute of limitations defense, the Texas Supreme Court held constructive notice from the deed records provided sufficient notice for limitations to immediately begin to run. *See id*.

In addition, the Texas Supreme Court in *Wise* did not overrule its earlier decision in *Sherman v. Sipper*, 152 S.W.2d 319 (Tex. 1941). In that case, the Texas Supreme Court held:

> The rule has long prevailed in this State that fraud will prevent the running of a statute of limitation only until such time as the fraud is discovered, or by the exercise of reasonable diligence it might have been discovered.
>
> Equally well settled is the rule that where a person has a right in property, and he claims fraudulent statements were made concerning the title to such

> property, when the records relating to such title are open to him he must exercise reasonable diligence to discover such defect; and if by the exercise of such diligence he could have discovered such defect and would have known of his right, he is held to have known it, and limitation will run against his claim from the time he could have made such discovery by the exercise of ordinary diligence.

Id. at 321 (internal citations omitted).

2. Fourth Court Decisions

Scott also relies on two decisions from this court. We first note both opinions were issued before the Texas Supreme Court's decision in *Ford*. In addition, both opinions are factually distinguishable from the instant case.

(a) *Lightfoot v. Weissgarber*

In *Lightfoot v. Weissgarber*, William M. Lightfoot and James O. Matthews entered into an earnest money contract in 1982 with Nance and Associates to purchase a tract of land. 763 S.W.2d 624, 626 (Tex. App.—San Antonio 1989, writ denied). The closing was initially scheduled for March of 1983 but was extended to April 5, 1983. *Id*. On the closing date, Lightfoot and Matthews paid the purchase price into escrow, but Nance refused to close the transaction. *Id*. In June of 1983, Nance conveyed the property to Michael Baucum, Trustee, and in February of 1984, Baucum deeded the property to Weissgarber, Trustee. *Id*. The deed to Weissgarber was recorded in March of 1984. *Id*.

In 1984, Lightfoot and Matthews sued Nance and Associates for breach of contract. *Id*. at 625. In 1987, they amended their petition to add claims against Nance for fraud, DTPA violations, and conspiracy. *Id*. They also added claims against Weissgarber. *Id*.

On appeal, Weissgarber argued that the recording of the deed to him in March of 1984 constituted notice to Lightfoot and Matthews and began the limitations period. *Id*. at 627. This court quoted *Wise* asserting, the "'purpose of recording laws is to notify subsequent purchasers … and not to give protection to [alleged] perpetrators of fraud.'" *Id*. (quoting *Wise*, 748 S.W.2d at

451). This court then held, "It therefore was not incumbent on the plaintiffs in this case to search the title records. The recording of the deed, of itself, would not operate to constitute notice to them of Weissgarber's title and begin the running of the statute of limitations." *Id*.

Weissgarber is distinguishable from the instant case because Lightfoot and Matthews never purchased the property and the deed to Weissgarber was recorded after the date the closing of their purchase was to occur. Therefore, Lightfoot and Matthews were not grantees who would be charged with notice of the recorded instruments in their chain of title.

(b) *Salinas v. Gary Pools, Inc.*

In the second case, Jose and Maria Salinas contracted with Gary Pools to install a swimming pool on their property in June of 1988. *Salinas v. Gary Pools, Inc.*, 31 S.W.3d 333, 335 (Tex. App.—San Antonio 2000, no pet.). In 1998, the Salinases decided to sell their house, and a survey revealed that the pool was partially installed on a public right of way easement owned by the city. *Id*. The Salinases sued Gary Pools asserting DTPA and negligence claims. *Id*. In reversing a summary judgment granted in favor of Gary Pools on the Salinases' DTPA claim, this court reasoned:

> In its motion for summary judgment, Gary Pools maintained that the Salinases had constructive notice of the public easement, as it was a matter of public record, and therefore no issue of fact existed regarding when the Salinases discovered their injury which occurred in 1988. The doctrine of constructive notice creates an irrebuttable presumption of actual knowledge of certain matters. *See HECI*, 982 S.W.2d at 887. It is applied when a person knows where to find the relevant information, and had a duty to find that information, but failed to seek it out. *See Little v. Smith*, 943 S.W.2d 414, 421 (Tex. 1997). The doctrine of constructive notice has limited application, and when the rationale behind application of the doctrine does not exist, public records will not be held to create an irrebuttable presumption of actual notice. *See HECI*, 982 S.W.2d at 887. For example, in *HECI Exploration Co. v. Neel*, the Texas Supreme Court noted that constructive notice of real property records is necessary to preserve stability and certainty regarding title to real property, and constructive notice of probate records in in rem proceedings is necessary because such proceedings are intended to bind all persons. This case is neither a case regarding title to real property, nor is it an in rem proceeding. *Id*. Gary Pools does not cite a case outside either of those two

> categories, which would show that the rationale behind application of the constructive notice doctrine exists within these facts.
>
> This court has previously held that the doctrine of constructive notice of real property records does not operate to constitute notice to plaintiffs bringing DTPA cases which would begin the running of the statute of limitations. *See Lightfoot v. Weissgarber*, 763 S.W.2d 624, 627 (Tex. App.—San Antonio 1989, writ denied). *See also Johnson v. Prudential Relocation Management*, 918 S.W.2d 68, 70 (Tex. App.—Eastland 1996, writ denied). The *Lightfoot* holding is based on the Texas Supreme Court's holding in *Ojeda de Toca v. Wise*, 748 S.W.2d 449, 451 (Tex. 1988), in which the court held that constructive notice of deed records does not constitute a defense to claims brought under the DTPA. Therefore, we hold that as to the Salinases' DTPA cause of action, the deed records in this case would not constitute constructive notice to commence the running of the statute of limitations. The Salinases produced summary judgment proof showing that they did not discover the easement because no title search was done on the property when they assumed the original owner's existing mortgage, and the easement was not visible to the eye. Whether or not the Salinases exercised reasonable diligence in discovering their DTPA cause of action remains a question of fact. Because Gary Pools failed to conclusively negate the application of the discovery rule, the summary judgment on the DTPA cause of action is reversed.

Id. at 336.37. *Salinas* also is distinguishable because the claims did not arise from a transaction involving the acquisition of property or relate to the title obtained as a result of such a transaction.

3. Conclusion

When Scott purchased Lot 2 in 2006, her deed referenced the plat in her chain of title that dedicates Lot 1 to the use and benefit of all of the lot owners in the subdivision as a park and for the purpose of granting all of the lot owners water access. Although *Wise* would prevent a defendant from asserting constructive notice based on the deed records as a direct defense to a DTPA claim, it does not prevent a defendant from relying on constructive notice to determine when limitations would begin to run on such a claim. Both the manner in which the court in *Wise* distinguishes *Pickhardt* as involving a "statute of limitations defense" and the Texas Supreme Court's subsequent opinion in *Ford* support the conclusion that Scott had constructive notice of the nature of her title to Lot 1 on the date of her purchase; therefore, limitations began to run on her claims on that date. Because Scott failed to file her lawsuit until seven years after her purchase,

the trial court properly concluded her claims were barred by limitations and properly granted summary judgment on that basis. Scott's first issue is overruled.[1]

ATTORNEYS' FEES

In her third and fourth issues, Scott contends the trial court erred in granting summary judgment awarding Furrow and Keller Williams attorneys' fees because they were not entitled to recover those fees based on the asserted grounds. As previously noted, Furrow and Keller Williams moved for summary judgment to recover attorneys' fees based on two grounds: (1) a contractual right to attorneys' fees under the earnest money contract Scott signed relating to her purchase of Lot 2; and (2) attorneys' fees as sanctions under section 17.50(c) of the DTPA for filing a groundless-bad faith DTPA claim.

With regard to recovery of attorneys' fees based on the earnest money contract, Scott correctly asserts this court rejected an identical argument in *Lesieur v. Fryar*, 325 S.W.3d 242, 250-253 (Tex. App.—San Antonio 2010, pet. denied). In *Lesieur*, we held the listing agent for the seller could not recover attorney's fees based on the contract between the seller and the buyer because it was not a party to the contract. 235 S.W.3d at 250-53. We further held the listing agent was not a third party beneficiary to the contract because the contract in that case contained a paragraph stating, "All obligations of the parties for payment of brokers' fees are contained in a separate written agreement." *Id*. at 253. The contract in this case contains an identical provision. Therefore, based on the precedent established in *Lesieur*, Furrow and Keller Williams were not entitled to recover attorneys' fees based on the contract between Scott and the seller.

[1] Because we hold summary judgment was properly granted based on limitations, we do not address Scott's second issue relating to other summary judgment grounds. *See* TEX. R. APP. P. 47.1 (providing opinion should address only issues necessary to final disposition).

With regard to recovery of attorneys' fees as a sanction under section 17.50(c),[2] Scott also correctly asserts attorneys' fees are not recoverable under section 17.50(c) without a "finding by the court" that Scott's DTPA was groundless, made in bad faith, or brought for purposes of harassment. *See Marker v. Garcia*, 185 S.W.3d 21, 30 (Tex. App.—San Antonio 2005, no pet.); *Gonzales v. Am. Title Co. of Houston*, 104 S.W.3d 588, 599 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Because the trial court's order in the instant case does not contain any such finding, Furrow and Keller Williams were not entitled to recover attorneys' fees under section 17.50(c).

In their brief, Furrow and Keller Williams do not dispute the law precluding their recovery of attorneys' fees based on the asserted grounds. Instead, they contend Scott did not preserve this argument against the recovery of the attorneys' fees. As the movants for summary judgment, however, Furrow and Keller Williams had the burden to conclusively establish their right to attorneys' fees as a matter of law. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979) ("Summary judgments must stand on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right."). Therefore, Furrow and Keller Williams's preservation argument fails.

Furrow and Keller Williams also assert this court should not reverse the trial court's judgment because the trial court could correct its failure to enter the requisite finding under section 17.50(c) on remand. A reversal is appropriate, however, because the trial court erred in granting summary judgment based on the asserted grounds. On remand, Furrow and Keller Williams will not be precluded from requesting the trial court to enter a finding under section 17.50(c) and

[2] Section 17.50(c) states, "On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs." TEX. BUS. & COM. CODE ANN. § 17.50(c) (West 2011).

awarding them attorney's fees on that basis; however, we express no opinion as to whether such a finding would be appropriate. *See Marker*, 185 S.W.3d at 30 n.4 (expressing no opinion as to whether defendant could obtain a finding to support the recovery of attorney's fees under section 17.50(c) on the remand of the cause).

CONCLUSION

The portion of the trial court's judgment ordering that Scott take nothing on her claims is affirmed. The portion of the trial court's judgment awarding Furrow and Keller Williams attorney's fees is reversed. The cause is remanded to the trial court for further proceedings.

Sandee Bryan Marion, Chief Justice